

February 6, 2018

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

**DIVISION II**

In the Matter of the Marriage of  
NATACHA LYNN MCFARLAND  
(fka HARVEY),  
  
Respondent,  
  
and  
CONRAD ELLIOTT HARVEY,  
  
Appellant.

No. 49496-5-II

UNPUBLISHED OPINION

WORSWICK, P.J. — Conrad Elliott Harvey appeals the trial court’s orders holding him in contempt for failing to pay his spousal maintenance obligation to Natacha Lynn McFarland (formerly known as Natacha Harvey), denying his petition to modify or terminate his maintenance obligation, and entering judgment against him for attorney fees for both the contempt and the maintenance proceedings. McFarland requests attorney fees on appeal. We affirm the trial court’s order holding Harvey in contempt, reverse the trial court’s order denying Harvey’s petition to modify or terminate maintenance and remand for further proceedings, affirm the trial court’s award of attorney fees, and decline to award attorney fees on appeal.

**FACTS**

Harvey and McFarland married in October 1991 and separated in June 2010. Their marriage was dissolved after a contested trial in November 2011, and the dissolution decree was amended in September 2012. At the time their marriage dissolved, Harvey was employed with the military and earned approximately \$11,000 each month. McFarland was unable to work and

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received approximately \$600 in social security disability each month. Pursuant to the amended dissolution decree, the trial court required that Harvey pay \$3,500 in maintenance to McFarland each month. Harvey was directed to pay maintenance to McFarland until she received Harvey's military retirement pay. The decree also provided:

Maintenance shall be modifiable and shall terminate upon any of the following: 1) husband's retirement from the military as stated in this paragraph; 2) death of either party; or 3) wife's remarriage.

Maintenance can be reviewed if a party shows a substantial change in circumstance given the following concerns: 1) The start date of husband's military retirement versus when his [active] duty pay ends; and 2) the wife's ability to get medical coverage given her monthly income.

Clerk's Papers (CP) at 8. The maintenance terms were not part of any separation or settlement agreement.

Shortly after the dissolution, the military conducted an investigation after reports regarding Harvey's infidelity and alleged assaults against McFarland and their children. In June 2013, following the investigation, the military initiated discharge proceedings against Harvey for conduct unbecoming of an officer. Harvey was notified that he could either accept an honorable discharge with the ability to withdraw from his pension and retirement in 2027 or accept a dishonorable discharge with the ability to access only his retirement funds immediately. On May 2, 2015, after unsuccessfully appealing the military's discharge decision, Harvey was honorably discharged, and he cannot access either his retirement benefits or his pension until 2027. Soon after, Harvey obtained nonmilitary temporary employment, earning \$5,500 each month. Harvey paid his spousal maintenance obligation to McFarland in May, but he failed to pay maintenance in June.

On June 9, 2015, McFarland filed a motion to have Harvey held in contempt for failing to comply with the maintenance obligation in the dissolution decree. McFarland also requested that the court enter a judgment for her attorney fees. One week later, and before the contempt hearing, Harvey filed a petition for modification or termination of the maintenance order in the parties' dissolution decree. In his petition, Harvey disclosed that he had \$4,000 in cash, but he did not disclose savings or retirement funds.

After hearing argument on both the motion to have Harvey held in contempt and the petition to modify maintenance, the trial court entered an order holding Harvey in contempt and an order denying Harvey's petition to modify his maintenance obligation. The trial court also awarded McFarland \$7,000 in attorney fees.

In its order holding Harvey in contempt for failing to pay maintenance to McFarland in June 2015, the trial court found that Harvey had the ability to pay maintenance in June 2015 but that he intentionally failed to do so. The trial court supplemented its order with a document entitled "Court's Decision." CP at 211. In this written decision, the trial court also found that Harvey "was on notice months in advance that his status with the military was going to be severely different in the near future" and that he failed to ensure that he would be able to pay his maintenance obligation. CP at 205. The trial court stated, "The Court finds this to be bad faith." CP at 205.

The trial court denied Harvey's petition to modify or terminate his spousal maintenance obligation after construing the language of the decree. First, the trial court reviewed the provision in the decree stating that "[m]aintenance shall be modifiable and shall terminate upon any of the following: 1) husband's retirement from the military as stated in this paragraph; 2)

death of either party; or 3) wife's remarriage." CP at 202. The court found that the decree provided that the maintenance obligation was modifiable but that maintenance could be terminated only when Harvey retired from the military, either Harvey or McFarland died, or McFarland remarried.

Next, the trial court analyzed the provision in the decree providing that "[m]aintenance can be reviewed if a party shows a substantial change in circumstance given the following concerns: 1) The start date of husband's military retirement versus when his [active] duty pay ends; and 2) the wife's ability to get medical coverage given her monthly income." CP at 202. After reviewing this language, the trial court found that to modify the maintenance obligation, these two conditions—a change in the start date of Harvey's military retirement versus the end date of his active duty pay and a change in McFarland's ability to receive medical coverage—must "be considered for the court to find a substantial change in circumstance and that both conditions must be met." CP at 203. The trial court determined that this provision made clear that the decree intended that McFarland receive maintenance payments until she received her portion of Harvey's retirement pay.

Ultimately, the trial court concluded that because Harvey was not receiving his military retirement pay, it could not consider whether there was a substantial change in circumstances regarding his ability to pay the maintenance obligation. Accordingly, the trial court determined that there was no "adequate cause for the modification." CP at 205.

The trial court also explained its rationale behind awarding McFarland attorney fees, stating:

[McFarland] is awarded \$7,000.00 in attorney fees. This is based upon the finding of contempt of [Harvey] and the significant differential in income of the parties

concerning [the modification order]. The two issues are so intertwined that the Court is unable to distinguish the efforts devoted to each issue.

CP at 205-06. The court found that McFarland had the financial need for contribution of payment for her attorney fees and that Harvey had the financial ability to pay those fees. Harvey appeals.

## ANALYSIS

### I. CONTEMPT ORDER

Harvey argues that the trial court abused its discretion by holding him in contempt for failing to pay maintenance because substantial evidence does not support the trial court's finding that Harvey had the ability to pay maintenance in June 2015.<sup>1</sup> Specifically, Harvey argues that substantial evidence does not support the trial court's finding that Harvey had notice that he was going to be discharged from the military and that he failed to take action to prevent the nonpayment of maintenance to McFarland. We disagree.

We review a trial court's decision in a contempt proceeding for an abuse of discretion. *In re Marriage of Eklund*, 143 Wn. App. 207, 212, 177 P.3d 189 (2008). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds or untenable reasons. 143 Wn. App. at 212. We review the trial court's factual findings for substantial evidence. 143 Wn. App. at 212.

Under RCW 26.18.050(1), an obligor who fails to pay a maintenance obligation can be subject to a contempt order under chapter 7.21 RCW. Contempt includes, among other things,

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<sup>1</sup> Harvey also argues in passing that the trial court erred in holding him in contempt because McFarland's motion was premature. Harvey did not raise this argument before the trial court, and we do not review it. RAP 2.5(a).

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“intentional . . . [d]isobedience of any lawful judgment, decree, order, or process of the court.”

RCW 7.21.010(1)(b). An obligor facing contempt for failure to pay spousal maintenance under RCW 26.18.050(1) may assert a defense that nonpayment was not intentional because he was unable to comply with the court’s order. RCW 26.18.050(4). An obligor asserting this defense bears the burden of proving his inability to comply. RCW 26.18.050(4).

When the trial court entered its dissolution decree, Harvey was employed by the military and earned approximately \$11,000 per month. McFarland was unable to work and received approximately \$600 in social security disability each month. The military initiated discharge proceedings against Harvey in June 2013. At that time, Harvey was notified that he could either accept an honorable discharge with access to his pension and retirement in 2027 or accept a dishonorable discharge with the ability to access his retirement funds immediately. Harvey received an honorable discharge from the military on May 2, 2015, and he cannot access his retirement benefits or his pension until 2027.

Harvey obtained a temporary position on May 18, earning approximately \$5,500 per month. Harvey paid his spousal maintenance obligation to McFarland in May, but he failed to pay maintenance in June. McFarland filed a motion to have Harvey held in contempt for failing to comply with the maintenance obligation in the dissolution decree, and Harvey subsequently filed a petition to modify his maintenance obligation. In his petition to modify the maintenance obligation, Harvey disclosed that he had \$4,000 in cash, but he did not disclose any savings or retirement funds.

The trial court entered an order holding Harvey in contempt for failing to pay maintenance to McFarland in June 2015. The trial court found that Harvey had the ability to pay

maintenance in June 2015 but that he intentionally failed to do so. The trial court expanded upon these findings in its written decision, finding that Harvey “was on notice months in advance that his status with the military was going to be severely different in the near future.” CP at 205. The trial court also found that Harvey “took no action to deal with the issue of the payment or lack thereof [on] the spousal maintenance until after contempt had been filed.” CP at 205. The trial court stated, “The Court finds this to be bad faith.” CP at 205.

Here, Harvey had notice that he was going to be discharged from the military for nearly two years. Harvey obtained a temporary position soon after he was discharged and paid his maintenance obligation for the month of May. Harvey did not petition to modify his maintenance obligation until after McFarland initiated contempt proceedings. Harvey disclosed that he had \$4,000 in cash at that time. As a result, substantial evidence supports the trial court’s finding that Harvey had the ability to pay maintenance in June 2015 and intentionally failed to do so. Harvey fails to meet his burden in showing that he was unable to comply with the maintenance obligation in the dissolution decree in June 2015. Consequently, the trial court did not abuse its discretion in holding Harvey in contempt.

Harvey also argues that the trial court abused its discretion by holding him in contempt because the trial court employed an incorrect legal standard in determining that Harvey acted in bad faith. Although the trial court found that Harvey acted in bad faith, it held Harvey in contempt for intentionally failing to pay maintenance to McFarland. Accordingly, the trial court employed the proper legal standard in holding Harvey in contempt. Harvey’s argument fails.

## II. ORDER DENYING MODIFICATION OF SPOUSAL MAINTENANCE

Harvey also argues that the trial court abused its discretion in denying his petition to modify or terminate his maintenance obligation because the trial court erred in failing to find that a substantial change in circumstances had not occurred and in determining that the maintenance obligation could not be modified. Stated another way, Harvey contends that the trial court abused its discretion by determining that Harvey had to meet two conditions listed in the dissolution decree before his maintenance obligation could be modified. We agree. Accordingly, we reverse the trial court's order denying Harvey's petition to modify or terminate maintenance and remand for further proceedings consistent with this opinion.

We review a trial court's ruling on a petition to modify spousal maintenance for an abuse of discretion. *In re Marriage of Drlik*, 121 Wn. App. 269, 274, 87 P.3d 1192 (2004). A trial court abuses its discretion when its decision is based on untenable grounds or reasons. *In re Marriage of Bowen*, 168 Wn. App. 581, 586, 279 P.3d 885 (2012). A decision is based on untenable reasons if it is based on an incorrect standard of law. 168 Wn. App. at 587.

Unless a separation contract provides otherwise, a spousal maintenance obligation is modifiable. RCW 26.09.070(7), 170(1)(b). Modification of a spousal maintenance obligation is governed by RCW 26.09.170(1). *See Drlik*, 121 Wn. App. at 275. Under RCW 26.09.170(1)(b), a court may modify a maintenance obligation only when the moving party demonstrates that a "substantial change in circumstances" occurred that the parties did not contemplate at the time of the initial dissolution decree. *See* 121 Wn. App. at 275. A "substantial change in circumstances" refers to the obligor spouse's financial ability to pay while accounting for the other spouse's necessities. *In re Marriage of Spreen*, 107 Wn. App. 341, 346, 28 P.3d 769 (2001).

In the amended decree of dissolution, the trial court required that Harvey pay \$3,500 in maintenance to McFarland each month. The decree also provided:

Maintenance shall be modifiable and shall terminate upon any of the following: 1) husband's retirement from the military as stated in this paragraph; 2) death of either party; or 3) wife's remarriage.

Maintenance can be reviewed if a party shows a substantial change in circumstance given the following concerns: 1) The start date of husband's military retirement versus when his [active] duty pay ends; and 2) the wife's ability to get medical coverage given her monthly income.

CP at 8.

In determining whether Harvey's maintenance obligation could be modified, the trial court examined the language in the dissolution decree. The trial court first reviewed the decree's provision that "[m]aintenance shall be modifiable and shall terminate upon any of the following: 1) husband's retirement from the military as stated in this paragraph; 2) death of either party; or 3) wife's remarriage." CP at 202. The court found that the decree provided that the maintenance obligation was modifiable but that maintenance could be terminated only when Harvey retired from the military, either Harvey or McFarland died, or McFarland remarried.

The trial court then examined when the maintenance obligation could be reviewed and modified. The court looked to the decree's statement that "[m]aintenance can be reviewed if a party shows a substantial change in circumstance given the following concerns: 1) The start date of husband's military retirement versus when his [active] duty pay ends; and 2) the wife's ability to get medical coverage given her monthly income." CP at 8; *see* CP at 203. The trial court found that this language showed that these two conditions—a change in the start date of Harvey's military retirement versus the end date of his active duty pay and a change in McFarland's ability to receive medical coverage—must occur for the court to modify Harvey's

maintenance obligation. The trial court also found that these two conditions must “be considered for the court to find a substantial change in circumstance and that both conditions must be met.” CP at 203.

The trial court concluded that because Harvey was not receiving his military retirement pay, it could not review whether there was a substantial change in circumstances regarding Harvey’s ability to pay maintenance. Accordingly, the trial court determined that there was no “adequate cause for the modification” and denied Harvey’s petition to modify the maintenance obligation. CP at 205.

The trial court based its decision on an incorrect legal standard by failing to consider the statutory factors in RCW 26.09.170(1) when it denied Harvey’s petition to modify his maintenance obligation. Under RCW 26.09.170(1)(b), a trial court can modify a maintenance obligation when there is a substantial change in circumstances that was not contemplated by the parties at the time the decree was entered. The trial court failed to correctly apply RCW 26.09.170(1)(b) in ruling that the two conditions listed in the decree must be met before Harvey could show a substantial change in circumstances. To determine whether there was a substantial change in circumstances here, the trial court was required to assess Harvey’s ability to pay against McFarland’s financial needs as well as whether the circumstances were within the contemplation of the parties at the time the decree was entered. The trial court failed to do so and instead construed the decree to determine that a substantial change in circumstances could occur only when Harvey received his retirement pay from the military. Accordingly, the trial court abused its discretion by applying an incorrect legal standard in denying Harvey’s petition to modify or terminate his maintenance obligation.

### III. ATTORNEY FEES

Harvey also argues that the trial court abused its discretion in awarding McFarland attorney fees for the contempt proceedings because the court failed to provide adequate findings of fact to explain the basis of its award. We disagree.

We review a trial court's award of attorney fees for an abuse of discretion. *In re Marriage of Obaidi*, 154 Wn. App. 609, 617, 226 P.3d 787 (2010). When awarding attorney fees, the trial court must make a record sufficient to permit meaningful review by articulating its grounds for the award. *White v. Clark County*, 188 Wn. App. 622, 639, 354 P.3d 38 (2015). Generally, this requires that the trial court supply findings of fact and conclusions of law to support the attorney fees award. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 144, 331 P.3d 40 (2014).

RCW 26.18.160 provides that the prevailing party in a contempt action for the enforcement of spousal maintenance is entitled to an award of attorney fees and costs. An award of attorney fees under RCW 26.18.160 is required and is not discretionary. *In re Marriage of Nelson*, 62 Wn. App. 515, 520, 814 P.2d 1208 (1991). RCW 26.09.140 permits the trial court to order one party in a modification action to pay attorney fees and costs to the other party after considering the parties' financial resources. *See also Marriage of Spreen*, 107 Wn. App. at 351. An award of attorney fees under RCW 26.09.140 is not limited to only the prevailing party. *In re Marriage of Rideout*, 150 Wn.2d 337, 357, 77 P.3d 1174 (2003).

At the time of the dissolution decree, Harvey was employed with the military and earned approximately \$11,000 each month. McFarland was unable to work and received approximately \$600 in social security disability each month. Later, Harvey received an honorable discharge

from the military and obtained a nonmilitary temporary position, earning approximately \$5,500 each month.

McFarland requested attorney fees for both the contempt proceedings and the modification proceedings. In its written decision, the trial court stated:

[McFarland] is awarded \$7,000.00 in attorney fees. This is based upon the finding of contempt of [Harvey] and the significant differential in income of the parties concerning [the modification order]. The two issues are so intertwined that the Court is unable to distinguish the efforts devoted to each issue.

CP at 205-06. The court found that the fees awarded were reasonable, and it also determined that McFarland had the financial need for contribution of payment for her attorney fees and that Harvey had the financial ability to pay those fees.

Harvey contends that the trial court's written findings are inadequate because the findings do not contain the trial court's grounds for the attorney fee award. We determine that Harvey's contention is unpersuasive. The prevailing party in a contempt action is entitled to attorney fees under RCW 26.18.160, and the award is required under the statute. *Marriage of Nelson*, 62 Wn. App. at 520. The trial court's written rulings make clear that the court was awarding McFarland attorney fees for the contempt proceedings because she prevailed on her motion to hold Harvey in contempt. As a result, the trial court's written findings are sufficient to permit our review of the trial court's grounds for awarding McFarland attorney fees for the contempt proceedings. Because an award of attorney fees to McFarland was required under RCW 26.18.160, the trial court did not abuse its discretion in awarding McFarland attorney fees for the contempt proceedings.

Further, the trial court properly analyzed an award of attorney fees under RCW 26.09.140. The trial court assessed Harvey's ability to pay attorney fees and costs against

McFarland's financial resources and determined that McFarland had the financial need for a contribution to her attorney fees. Although we reverse the trial court's order denying Harvey's petition to modify or terminate maintenance, an award of attorney fees under RCW 26.09.140 is not limited to the prevailing party in the underlying action. Accordingly, the trial court did not abuse its discretion in awarding fees under RCW 26.09.140.

#### ATTORNEY FEES ON APPEAL

McFarland requests attorney fees on appeal under RCW 26.09.140 for defending the spousal maintenance obligation in the dissolution decree. We decline to award McFarland attorney fees.

In determining whether a fee award under RCW 26.09.140 is appropriate, we consider the parties' financial resources and the merit of the issues raised on appeal. *In re Marriage of Fiorito*, 112 Wn. App. 657, 670, 50 P.3d 298 (2002). However, attorney fees are awarded under RCW 26.09.140 only when the requesting party files an affidavit of financial need no later than 10 days before his or her case is considered. RAP 18.1(c).

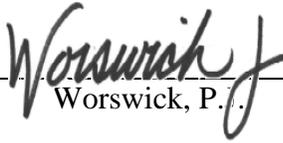
McFarland failed to file an affidavit of financial need within 10 days of the date her case was considered. Therefore, we decline to award McFarland attorney fees under RCW 26.09.140.

#### CONCLUSION

We affirm the trial court's order holding Harvey in contempt, reverse the trial court's order denying Harvey's petition to modify or terminate maintenance and remand for further proceedings, affirm the trial court's award of attorney fees, and decline to award attorney fees on appeal.

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A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

  
Worswick, P.J.

We concur:

  
Lee, J.

  
Melnick, J.